



## **MONTGOMERY COUNTY ETHICS COMMISSION**

### **ADVISORY OPINION 2000-5**

A member (the Requester) of the Montgomery County Commission on Common Ownership Communities (the “COC”) has requested, under §19A-7 of the Montgomery County Ethics Law, an advisory opinion on several questions arising out of: (a) his service as a board member and officer of his homeowners association; and (b) the activities of another COC member who also has a financial interest in the company that manages the requester’s association’s property.

#### **Pertinent Facts**

The Requester provided the following pertinent facts:

1. He is member of the COC and chairs one its committees.
2. He also is a Board Member and Secretary of his homeowners association.
3. As an Association Board member, he votes on all of the Association’s contracts.
4. The Association recently hired a new management company (“The Management Co.”).
5. Another member of the COC, who also serves on the Committee the requester chairs, has a financial interest in Management and personally services its contract with the Association (the “Management Representative”).<sup>1</sup>
6. “[The COC] votes on accepting jurisdiction over cases and then holds administrative hearings regarding disputes between homeowners and their associations.”

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<sup>1</sup> This person’s private business card identifies him as a “Vice President-Principal” of the company.

7. At times, the Management Co. Representative or another of its agents represent parties before the COC or are witnesses in COC proceedings.

### **Questions Presented**

Against this background, the Requester asked:

1. May he, as a member of the COC, vote on accepting or denying jurisdiction over a case or serve on a hearing panel in which the Management Representative or the Management Company: (a) represents one of the parties; (b) may be a witness; or (c) is employed by or has a contract with one of the parties.

2. Does the fact that he, as a member of the board of his homeowner's association, votes on the Association's contract with the Management Company "otherwise raises questions concerning voting on COC issues. That is, does it raise a concern that [COC's] votes can be coerced."

### **Applicable Law**

*The Common Ownership Commission Law.*

The COC is a creature of §10B-3 of the Montgomery County Code (M.C.C.). It consists of fifteen voting members and six *ex officio* non-voting members.<sup>2</sup> The voting members are appointed by the County Executive, subject to confirmation by the County Council and the following requirements:

- (1) Six members should be selected from residents of self-managed and professionally managed condominiums, self-managed and professionally managed cooperative housing corporations, and self-managed and professionally managed homeowners' associations, and may include members or former members of governing boards.
- (2) Three members should be selected from persons involved in housing development and real estate sales.
- (3) Six members should be selected from persons who are members of professions associated with common ownership communities (such as attorneys who represent associations, developers, housing management or tenants) or investor-owners of units in common ownership communities,

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<sup>2</sup> M.C.C. § 10B-3 (b).

including at least one person who is a professional community association manager.<sup>3</sup>

The *ex officio* members are designees of the County Council, Planning Board, Department of Environment Protection, Department of Permitting Services, Department of Public Works and Transportation, and Department of Housing and Community Affairs. The COC elects one voting member as its Chair and another as its Vice-Chair. They serve at the pleasure of COC. Voting members receive no compensation for their services.<sup>4</sup>

The COC's responsibilities include the duty to hear and decide disputes "among an owner, the governing body, and an occupant of a dwelling unit in a common ownership community."<sup>5</sup> For these purposes, "dispute" means any disagreement between 2 or more parties that involves: (1) the authority of a governing body, under any law or association document, to: (i) require any person to take any action, or not to take any action, involving a unit; (ii) require any person to pay fee, fine, or assessment; (iii) spend association funds; or (iv) alter or add to a common area or element; or (2) the failure of a governing body, when required by law or an association document, to: (i) properly conduct an election; (ii) give adequate notice of a meeting or other action; (iii) properly conduct a meeting; (iv) properly adopt a budget or rules; (v) maintain or audit books and records; or (vi) allow inspection of books and records.<sup>6</sup>

In the exercise of this quasi-judicial authority, the COC votes on whether a case is within the COC's jurisdiction.<sup>7</sup> If there is jurisdiction and the dispute is not essentially identical to another dispute between the same parties, the matter is heard and decided by either a hearing examiner or a hearing panel.

The parties, by agreement, may require that the hearing be held and the dispute decided by a hearing examiner designated by the COC Chair, and that decision is final administrative decision and subject to judicial review.<sup>8</sup>

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<sup>3</sup> M.C.C. § 10B-3 (a).

<sup>4</sup> M.C.C. § 10B-3 (g).

<sup>5</sup> M.C.C. §§ 10B-8 (7) and 10B-9 (a).

<sup>6</sup> M.C.C. § 10B-8 (3) ("Dispute" does not include any disagreement that only involves title to any unit or any common area or element; the percentage interest or vote allocable to a unit; the interpretation or enforcement of any warranty; the collection of an assessment validly levied against a party; or the judgment or discretion of a governing body in taking or deciding not to take legally authorized action. M.C.C. § 10B-4(4)).

<sup>7</sup> M.C.C. § 10B-12 (a) (2).

<sup>8</sup> Mont. Co. Code §10B-12 (e).

If the parties do not require a hearing and decision by a hearing examiner, the COC Chair must convene a three-member hearing panel, two of whom are voting members of the COC.<sup>9</sup> The third member of the hearing panel is a volunteer arbitrator whom the two COC panel members select from a list of volunteer arbitrators maintained by the COC.

If the COC Chair decides that the matter should be heard by a hearing examiner rather than by the COC hearing panel, the COC Chair, with the approval of the Commission, may designate a hearing examiner to hold the hearing and forward a recommended decision and order to the COC hearing panel. If the COC Chair does not designate a hearing examiner, the panel hears and decides the matter. In either of these events, the decision of the hearing panel is the final administrative decision, and is subject to judicial review.

A final decision-maker “may order the payment of damages and any other relief that the law and the facts warrant,” and award costs, including reasonable attorney fees and filing fee.

*The Montgomery County Ethics Law.*

The Montgomery County Public Ethics Law—Chapter 19A of the Montgomery County Code—is founded on the following express legislative findings and statement of policy:

- (a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.
- (b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.
- (c) To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.
- (d) The Council intends that this Chapter, except in the context of imposing criminal sanctions, be liberally construed to accomplish the policy goals of this Chapter.

In furtherance of these findings and policy goals, the conflict of interest provisions of the Ethics Law expressly prohibit certain kinds of activity by public employees. First, unless permitted by a waiver, a public employee must not participate, as a public employee, in any

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<sup>9</sup> One of these two COC voting members must be a resident of a common ownership community.

matter that affects, in a manner distinct from its effect on the public generally, any: (a) property in which the public employee holds an economic interest; (b) business in which the public employee has an economic interest; or (c) property or business in which a relative has an economic interest, if the public employee about the relative's interest.<sup>10</sup> However, this prohibition does not apply to public employee who is appointed to a regulatory or licensing body under a statutory provision that persons subject to the jurisdiction of the body may be represented in appointments to the body.<sup>11</sup>

Second, a public employee may not participate, without a waiver, in any matter if the public employee knows or reasonably should know that any party to the matter is: (a) any business in which the public employee has an economic interest or is an officer, director, trustee, partner, or employee; (b) any business in which a relative has an economic interest, if the public employee knows about the interest; (c) any business with which the public employee is negotiating with a relative or has an arrangement with a relative about prospective employment, if the public employee knows about the negotiations or the arrangement; (e) any business or individual that is a party to an existing contract with the public employee or a relative, if the contract could reasonably result in a conflict between private interests and official duties; (f) any business that is engaged in a transaction with a County agency if another business owns a direct interest in the business; the public employee or a relative has a direct interest in the other business; and the public employee reasonably should know of both direct interest; (g) any business that is subject to regulation by the agency with which the public employee is affiliated if another business owns direct interest in the business, the public employee or a relative has a direct interest in the other business, and the public employee reasonably should know of both direct interests; or (h) any creditor or debtor of the public employee or a relative if the creditor or debtor can directly and substantially affect an economic interest of the public employee or relative.<sup>12</sup>

For these purposes, "public employee" includes any person appointed by the County Executive to a board, commission, committee, task force, or similar body, whether or not the person is compensated for serving on the body,<sup>13</sup> and "business means any for-profit or non-profit enterprise, including a corporation, general or limited partnership, sole proprietorship, join venture, association, firm, institute, trust, or foundation."<sup>14</sup>

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<sup>10</sup> M.C.C. § 19A-11 (a) (1).

<sup>11</sup> M.C.C. c 19A-11 (b) (3).

<sup>12</sup> M.C.C. § 19A-11 (a) (2).

<sup>13</sup> M.C.C. § 19A-4 (m).

<sup>14</sup> M.C.C. § 19A-4 (b).

## ANALYSIS, CONCLUSIONS & ADVICE

The Ethics laws applies to the members of the COC, and, among other things, expressly prohibits a member from participating in a matter if he or she is a member of the board of directors of a business that is a party to the matter.<sup>15</sup> Although a homeowner's association might not be a business for the purposes of other statutes, both the language and the context of the Ethics Law support the conclusion that a homeowners association is a business for the purposes of the conflict of interest provisions of the Ethics Law, especially as applied to County officials exercising quasi-judicial authority. The Ethics Law defines the term "business" to mean, among other things, a non-profit enterprise, including a joint venture or association.<sup>16</sup> Moreover, as noted above, the Ethics Law is founded on the specific goals of ensuring impartiality and avoiding the appearance of improper influence:

Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment. The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

The Ethics Law is expressly intended to be liberally constructed to accomplish those goals.

Nothing is more fundamental in a quasi-judicial proceeding than the requirement that the decision-maker be impartial.<sup>17</sup> Indeed, impartiality is a well recognized element of the fundamental fairness that is guaranteed by the due process provisions of the constitutions of Maryland and the United States.<sup>18</sup> As a matter of law, therefore, an adjudicatory who sits on the board of directors of one of the parties to a dispute is not impartial and, for that reason, the Ethics Law specifically prohibits him or her from participating in the matter.

The Ethics Law does not, however, specifically prohibit a county employee from participating as a quasi-judicial decision-maker in a matter in which one of the parties has a contractual relationship with a business on whose board the county employee serves. There can be specific circumstances under which the relationship between a public-employee decision-maker and a business or its agent is so pervasive as to undermine the decision-

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<sup>15</sup> M.C.C. § 19A-10 (a) (2) (A).

<sup>16</sup> M.C.C. § 19A-4 (b).

<sup>17</sup> See, e.g., *B & O. R.R. Co. v. Canton Co.*, 70 Md. 405 (1899), in which the Court of Appeals, saying " [i]t is a maxim of every code, in every county, that no man should be judge in his own case," set aside the decision of two arbitrators because one of them was a stockholder in a company that was a party of the arbitration.

<sup>18</sup> The ancient right to due process of law is secured by the Fourteenth Amendment to the Constitution of the United States and by Article 24 of the Maryland Declaration of Rights.

maker's impartiality in fact. However, the facts stated in this request do not constitute such circumstances. In particular, the mere fact that a COC member sits on the board of a community association that has a contract with a party, representative of a party or witness in a COC quasi-judicial proceeding rises to that level. Neither does the fact that another member of the COC participates, as a private individual or employee, as a party, representative of a party, or witness for a party in a before the COC.

The Ethics Law, therefore, prohibits a member of the COC from participating as a decision-maker in a quasi-judicial proceeding (whether involving only a threshold jurisdictional decision or a decision on the merits) in which one of the parties is a homeowner's association of which the COC member is a director.

The Ethics Law does not, however, prohibit a COC member from participating as a decision-maker in a quasi-judicial proceeding merely because the company that manages the contract with the member's homeowner's association or its agent represents one of the parties, may be a witness for one of the parties, or has a contract with one of the parties. Furthermore, if another member of the COC who is has a financial interest in a management company may appear before the COC in one of those capacities, that members appearance would no, in and of itself, prohibit other COC members —even those who serve on the board of a community association that has a contract with the other member's management company— from participating as decision-maker in the quasi-judicial proceedings. As in all cases, only if the business or personal relationship between such members would make it impossible for the member to participate impartially, would the Ethics Law prohibit participation as a quasi-judicial decision-maker. The facts presented in this request do not compel that result.

December 11, 2002

[signed]  
Walter A. Scheiber  
Chairman